IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
September 26, 2006 Session

# GARLAND GODSEY v. STATE OF TENNESSEE

**Direct Appeal from the Criminal Court for Cumberland County**
**No. 4969 Leon C. Burns, Jr., Judge**

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**No. E2006-00050-CCA-R3-PC - Filed November 14, 2006**

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The petitioner, Garland Godsey, appeals the denial of his petition for post-conviction relief from his second degree murder conviction, arguing that his trial counsel was ineffective for failing to request a jury instruction on diminished capacity and for failing to file a timely motion for a new trial. Following our review, we affirm the post-conviction court's denial of the petition.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Criminal Court Affirmed**

ALAN E. GLENN, J., delivered the opinion of the court, in which NORMA MCGEE OGLE and J.C. MCLIN, JJ., joined.

John E. Appman, Jamestown, Tennessee, for the appellant, Garland Godsey.

Paul G. Summers, Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; William Edward Gibson, District Attorney General; and Benjamin W. Fann, Assistant District Attorney General, for the appellee, State of Tennessee.

## OPINION

## FACTS

The petitioner was indicted by the Cumberland County Grand Jury for the first degree premeditated murder of the victim, Eddie Parsons, convicted by a Cumberland County Criminal Court jury of the lesser-included offense of second degree murder, and sentenced by the trial court as a violent offender to twenty-five years in the Department of Correction. See State v. Garland Godsey, No. E2000-01944-CCA-R3-CD, 2001 WL 1543474, at *1 (Tenn. Crim. App. Dec. 4, 2001), perm. to appeal denied (Tenn. May 6, 2002). The petitioner filed an untimely motion for a new trial, which the trial court overruled, followed by an untimely appeal to this court in which he challenged the sufficiency of the jury instructions and the sentence imposed. Id. Finding no plain error in the trial court's failure to instruct the jury on diminished capacity and no error in sentencing, we

affirmed both the petitioner's conviction and sentence, and our supreme court subsequently denied the petitioner's application for permission to appeal. Id.

The victim in this case was brutally attacked by the petitioner in a bar and died in a nursing home approximately one month later without ever having regained consciousness. Id. Our direct appeal opinion provides the following account of the crime and the petitioner's defense at trial:

> The facts of this case are essentially undisputed and do not require a lengthy exposition. Numerous patrons of the Good Times Bar witnessed the [petitioner] attack [the victim]. According to the testifying witnesses, [the victim] had been at the bar drinking for some time, and by all accounts, he was very inebriated. The [petitioner] was no stranger himself to alcohol, and by the time he arrived at the bar, he had consumed approximately one and one-half cases of beer. The [petitioner] approached [the victim], and an argument ensued about a $40 debt that [the victim] owned [sic] the [petitioner]. When the confrontation threatened to become physical, a female patron interceded and separated the two men. The [petitioner] and [the victim] retreated to opposite ends of the bar.
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> The atmosphere in the bar seemingly calmed down, and the [petitioner] told the bartender to prepare a round of drinks for everyone present. At some point, the [petitioner] and [the victim] resumed their argument by verbally exchanging obscenities and, as described by one witness, just "mouthing back and forth." The exchange continued in this fashion until [the victim] called the [petitioner] a "son of a bitch." The [petitioner] stood and moved toward [the victim]. Some witnesses testified that the [petitioner] walked, and others said that he ran. Nonetheless, when he reached [the victim], the [petitioner] punched [the victim] with his fist with such force that [the victim] was catapulted backwards off his bar stool. [The victim's] head hit the concrete floor.
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> The witnesses' accounts diverge over whether the [petitioner] continued with his fists to pound [the victim] in the head, began kicking [the victim's] lifeless body, or "jumped flat-footed in the air and stomped him in the face." There is agreement, however, that during the attack the [petitioner] grabbed [the victim's] hair and slammed his head repeatedly into the concrete floor. The female patron who had earlier interceded testified that she tried to pull the [petitioner] off of [the victim]. She testified that she hollered, "You're killing him." Eventually, the attack subsided, and the defendant left the bar.
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> . . . .
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> At trial, the defense did not dispute that the [petitioner] attacked [the victim] and caused [the victim's] death; nor did the defense rely on self-defense or pursue an affirmative defense of insanity at the time of the commission of the offense. Rather,

> the defense sought to demonstrate through expert testimony that the [petitioner] suffers from "intermittent explosive disorder" whereby his capacity to control aggressive impulses is extremely diminished. As a result, the defense argued that the [petitioner] did not have the mental culpability required for first or second degree murder. The jury, nonetheless, found the [petitioner] guilty of second degree murder.

Id. at *1-2.

On May 8, 2003, the petitioner filed a *pro se* petition for post-conviction relief in which he raised a number of claims, including ineffective assistance of counsel. On November 15, 2005, following the appointment of his third successive post-conviction counsel, the petitioner moved to amend the petition by, among other things, including allegations that his trial counsel was ineffective for failing to request Tennessee Pattern Jury Instruction 42.22, "Evidence of Mental State," and for failing to file a timely motion for a new trial.

The petitioner presented two witnesses at the November 29, 2005, hearing: his trial counsel and John Nisbet, an attorney who was licensed to practice law in 1988 and who had been employed with the Thirteenth Judicial District Public Defender's Office since April 1, 2001. Nisbet recounted his experience with criminal law, testifying that he began his legal career in 1988 as an assistant attorney general for the State of Tennessee, was employed from July 1994 until November or December 1997 as an assistant district attorney for the Thirteenth Judicial District, and was in the private practice of law from November or December 1997 until accepting his current position with the public defender's office. He said that during the time he was in private practice, he had a contract with the public defender's office to handle its appellate work.

Nisbet testified that he had reviewed the direct appeal opinion in the petitioner's case, which revealed that both the motion for new trial and notice of appeal had been untimely. He said the effect of the untimely filing of the motion for new trial was that the appellate court was limited to plain error review when considering whether the trial court erred by not issuing the pattern jury instruction on diminished capacity. On cross-examination, Nisbet acknowledged that this court noted in the direct appeal opinion that the petitioner was afforded wide latitude to present evidence to show that his low serotonin levels, alcoholism, brain damage, mental retardation, and intermittent explosive disorder had combined to result in his diminished capacity to commit the offense. Nisbet further acknowledged that this court went on to conclude that the trial court was not required to separately charge diminished capacity.

Trial counsel testified that he had been licensed to practice law in the State of Tennessee since April 1981, concentrated his practice on state and federal criminal defense, and had handled many criminal cases over the years. He said he was initially retained by the petitioner's family when the petitioner's case was still in general sessions court. After the victim died and the case was bound over to criminal court, the trial court appointed him to represent the petitioner on the murder charge. Trial counsel testified that, after investigation, he developed a defense based on the petitioner's low serotonin level. He said he eventually requested and received over $34,000 in funds from the State

to pay for several expert witnesses, including Dr. Paul Rosby, who testified about the petitioner's abnormally low serotonin level and the petitioner's resulting inability to control his impulses, and Dr. Daniel Martel, a psychologist from California who testified about the petitioner's diminished capacity. Trial counsel stated that he additionally attempted to prove that the medical care the victim received was an intervening cause of the victim's death.

Trial counsel explained that he made a tactical decision not to request the "diminished capacity" jury instruction, or T.P.I.-Crim. 42.22: "The reason was, is that I did not want to request it. I believed then, and believe today, that the Trial Court was obligated to give it, and the failure to give it would constitute error that could be used depending upon what the jury decided." Trial counsel said that he prepared a motion for new trial, raising as an issue the trial court's failure to give the instruction on diminished capacity, and instructed his staff to ensure that the motion was mailed. He stated that he did not learn that the motion had not been mailed until four or five months later, when he arrived at court to argue the motion.

At the conclusion of the hearing, the post-conviction court dismissed the petition for post-conviction relief, finding, among other things, that the petitioner had not met his burden of showing that he was prejudiced by trial counsel's deficiencies in representation. The post-conviction court subsequently entered a written order incorporating by reference its extensive oral findings of fact and conclusions of law.

## ANALYSIS

The petitioner contends that he was denied the effective assistance of counsel due to the fact that counsel did not request T.P.I.-Crim. 42.22 to be charged and did not timely file the motion for new trial, the effect of which was, according to the petitioner, that he could not raise as an issue on appeal the fact that this instruction had not been charged. The State responds by arguing, *inter alia*, that the record supports the post-conviction court's finding that the lack of the jury instruction did not prejudice the outcome of the petitioner's case. We agree with the State.

The post-conviction petitioner bears the burden of proving his allegations by clear and convincing evidence. See Tenn. Code Ann. § 40-30-110(f) (2003). When an evidentiary hearing is held in the post-conviction setting, the findings of fact made by the court are conclusive on appeal unless the evidence preponderates against them. See Tidwell v. State, 922 S.W.2d 497, 500 (Tenn. 1996). Where appellate review involves purely factual issues, the appellate court should not reweigh or reevaluate the evidence. See Henley v. State, 960 S.W.2d 572, 578 (Tenn. 1997). However, review of a trial court's application of the law to the facts of the case is *de novo*, with no presumption of correctness. See Ruff v. State, 978 S.W.2d 95, 96 (Tenn. 1998). The issue of ineffective assistance of counsel, which presents mixed questions of fact and law, is reviewed *de novo*, with a presumption of correctness given only to the post-conviction court's findings of fact. See Fields v. State, 40 S.W.3d 450, 458 (Tenn. 2001); Burns v. State, 6 S.W.3d 453, 461 (Tenn. 1999).

To establish a claim of ineffective assistance of counsel, the petitioner has the burden to show both that trial counsel's performance was deficient and that counsel's deficient performance prejudiced the outcome of the proceeding. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984); see State v. Taylor, 968 S.W.2d 900, 905 (Tenn. Crim. App. 1997) (noting that same standard for determining ineffective assistance of counsel that is applied in federal cases also applies in Tennessee). The Strickland standard is a two-prong test:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

466 U.S. at 687, 104 S. Ct. at 2064.

The deficient performance prong of the test is satisfied by showing that "counsel's acts or omissions were so serious as to fall below an objective standard of reasonableness under prevailing professional norms." Goad v. State, 938 S.W.2d 363, 369 (Tenn. 1996) (citing Strickland, 466 U.S. at 688, 104 S. Ct. at 2065; Baxter v. Rose, 523 S.W.2d 930, 936 (Tenn. 1975)). The prejudice prong of the test is satisfied by showing a reasonable probability, *i.e.*, a "probability sufficient to undermine confidence in the outcome," that "but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694, 104 S. Ct. at 2068.

Because both prongs of the test must be satisfied, a failure to show either deficient performance or resulting prejudice results in a failure to establish the claim. See Henley, 960 S.W.2d at 580. For this reason, courts need not approach the Strickland test in a specific order or even "address both components of the inquiry if the defendant makes an insufficient showing on one." 466 U.S. at 697, 104 S. Ct. at 2069; see also Goad, 938 S.W.2d at 370 (stating that "failure to prove either deficiency or prejudice provides a sufficient basis to deny relief on the ineffective assistance claim").

In concluding that the petitioner had failed to meet the prejudice prong of his ineffective assistance of counsel claim, the post-conviction court stated in pertinent part:

> Did the failure to read this instruction have any impact or bearing on the outcome of the trial? In this Court's opinion, it did not, because of what I had previously said, that we had the whole focus of the trial was on the [petitioner's] inability to form the reckless and intentional or knowing act, and they were told that they had to find beyond a reasonable doubt the culpable mental state that would apply to each one of these crimes.

> And, so, in my opinion, not only was there no plain error, there wasn't any error; it didn't affect the outcome of the trial. There is no defense of diminished capacity. The [petitioner] is entitled to put on proof that shows he's not capable of forming the reckless mental state, and that's what he did. We had lots of it. So he wasn't denied that right. The jury clearly understood what the issue was, in this Court's opinion, because they analyzed the circumstance and determined that it wasn't an intentional premeditated act, but that it was a knowing act, and I think that they could have found that easily because Dr. Martel testified that [the petitioner] knew what he was doing. So, it wasn't like that they came off the wall with it; there was testimony from the defense that he knew.

The record supports the findings and conclusions of the post-conviction court. As the State points out in its brief, we concluded on direct appeal that the trial court was not required to separately charge the jury on "diminished capacity" and, thus, that no "clear and unequivocal rule of law" was breached by the trial court's failure to give T.P.I.-Crim. 42.22. After reviewing the five factors to be considered when determining whether plain error has occurred, we stated:

> In this case, we are convinced that no plain error occurred. The concept of diminished capacity recognizes that a defendant may offer evidence relevant to show the existence of a mental condition that could negate the *mens rea* for the charged offense. Diminished capacity is not a defense to the commission of a crime. State v. Hall, 958 S.W.2d 679, 688-89 (Tenn. 1997). The [petitioner] in this case was afforded the widest latitude in the introduction of expert and lay testimony in an effort to identify and explain how the combination of low serotonin, alcoholism, brain damage, mental retardation, and intermittent explosive disorder resulted in diminished capacity to form the culpable mental state of mind for first and second degree murder. In closing arguments, the defense then relied heavily on that testimony in promoting the position that the [petitioner] did not "premeditate" the homicide and did not "knowingly" kill [the victim]. We have, furthermore, reviewed the trial court's charge in this case, and the jury was correctly instructed on the proper *mens rea* required for first degree murder and the applicable lesser-included offenses. The trial court, in our opinion, was not required to separately charge "diminished capacity." See State v. Grose, 982 S.W.2d 349, 354 (Tenn. Crim. App. 1997) (no particular additional jury instruction on diminished capacity necessary where defendant introduced proof of his diminished mental abilities and jury was instructed on proper mens rea required for first degree murder). Because the failure to instruct does not breach a clear and unequivocal rule of law, plain error is not indicated.

Garland Godsey, 2001 WL 1543474, at *3.

The petitioner cites State v. Phipps, 883 S.W.2d 138 (Tenn. Crim. App. 1994), as support for his contention that the trial court committed reversible error by not instructing the jury on T.P.I.-

Crim. 42.22. However, we find that the petitioner's reliance on Phipps is misplaced. The defendant in Phipps, who was charged with first degree premeditated murder, presented expert and lay testimony that he suffered from post-traumatic stress disorder and major depression at the time he committed the offense. 883 S.W.2d at 143. At the conclusion of the trial, the trial court instructed the jury that such evidence did not constitute a defense. Id. Moreover, the trial court refused to instruct the jury, as the defense requested, that it could consider the evidence "on the issue of proof of requisite mental state." Id. On appeal, we reversed, concluding that the trial court's instructions had the effect of misleading the jury into believing that it could not consider the defendant's evidence of his mental condition when determining whether he had the requisite mental intent for the crime:

> The trial court's instruction that post-traumatic stress disorder and major depression were not defenses was likely to confuse and mislead the jury. Moreover, the instruction in this case did not simply limit the use of the evidence. It suggested that the evidence was of no consequence since the appellant was not pleading insanity. The instruction effectively removed the appellant's defense theory, which is an accepted one in Tennessee, from the jury's consideration.

Id. at 150-51 (footnote omitted).

The trial court in the case at bar, unlike in Phipps, did not instruct the jury that the petitioner's evidence relating to his mental condition did not constitute a defense. Instead, the court properly instructed the jury on the elements of the indicted and lesser-included offenses and on the State's responsibility to prove each element of the offenses beyond a reasonable doubt. The trial court, additionally, issued the pattern jury instruction on expert testimony. See T.P.I.-Crim. 42.02. There was, therefore, no danger that the jury was misled into believing that it could not consider the petitioner's evidence relating to his mental condition when determining whether the petitioner had the requisite *mens rea* for the offenses. Likewise, the petitioner was not prejudiced by the fact that his claim as to the jury instruction could not be raised on appeal.

## CONCLUSION

We conclude that the petitioner has failed to meet his burden of demonstrating that he was prejudiced by trial counsel's failure to request T.P.I.-Crim. 42.22 or by his failure to file a timely motion for new trial. Accordingly, we affirm the denial of the petition for post-conviction relief.

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ALAN E. GLENN, JUDGE